No. 12,447.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES T. HAINES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

ERNEST A. TOLIN,
United States Attorney,
NORMAN W. NEUKOM,
Assistant U. S. Attorney,
Chief of Criminal Division,
JACK E. HILDRETH,
Assistant U. S. Attorney,
600 U. S. Postoffice and Court House Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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I.

Jurisdictional Statement.

Appellant was indicted under Section 471 of Title 18, United States Code, on March 9, 1949 [Clk Tr. p. 2].[1] The offense was committed in Los Angeles County, California. On April 27, 1949, defendant (appellant) entered a plea of guilty to the offense charged in the Indictment [Clk. Tr. p. 10] and he was sentenced to the custody of the Attorney General for imprisonment for a period

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[1]References preceded by "Clk. Tr." are to the Clerk's Transcript.

of five years [Clk. Tr. p. 20]. Upon motion of defendant (appellant), the Court set aside the plea of guilty on June 24, 1949 [Clk. Tr. p. 34], and the cause was set for trial. The case was tried to the Court without a jury on September 8, 1949, and on September 9, 1949, the Court found defendant (appellant) guilty as charged. On October 24, 1949, defendant (appellant) was sentenced to imprisonment for a period of five years, and judgment was so entered [Clk. Tr. p. 53].

The District Court had jurisdiction of this cause of action under 18 U. S. C. 3231.

There was no Motion for New Trial. Notice of Appeal was filed on October 28, 1949 [Clk. Tr. p. 56].

This Court has jurisdiction under 28 U. S. C. 1291-1294.

II.

Statute Involved.

The Indictment charges a violation of Section 471 of Title 18, United States Code, which provides:

> "§471. Obligations or securities of United States.
>
> "Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both." (Old Section 262 of Title 18, United States Code.)

III.

Statement of the Case.

On March 9, 1949, the Federal Grand Jury at Los Angeles, California, returned an Indictment in one Count against James T. Haines, appellant herein. The Indictment was filed on the same date, in the United States District Court in and for the Southern District of California, Central Division, and charged that the defendant (appellant):

> "On or about January 29, 1949, in Los Angeles County, California, with intent to defraud, did falsely make, forge, and counterfeit, and did aid and assist in the making, forging, and counterfeiting of four $100.00 Federal Reserve Notes purporting to be Federal Reserve Notes of the Federal Reserve Bank of San Francisco, obligations and securities of the United States."

Appellant's Motion to Withdraw Plea of Guilty was granted, and on April 27, 1949, appellant pleaded not guilty to the charge in the Indictment.

Trial to the Court without a jury was commenced on September 8, 1949, and on September 9, 1949, the Court found defendant (appellant) guilty as charged in the Indictment.

Motion for New Trial was not filed.

Appellant assigns as error the judgment of conviction, on three main grounds, namely:

1. That the evidence was insufficient to support a verdict of guilty, and that the verdict was contrary to the law and evidence;

2. That the Court erred in receiving the alleged confessions of defendant (appellant) in evidence [Gov't Ex. 15 (written confession) and the oral confession to Assistant U. S. Attorney R. H. Kinnison];

3. That the Trial Court erred in not granting a Motion for New Trial and to set aside the verdict which he had rendered without an intelligent understanding of the Waiver of Trial by Jury filed by defendant (appellant).

The Assignment of Errors will be considered by the Government in its Brief in the order as above set forth.

IV.

Facts.

Appellant became acquainted with one Robert Harold White on or about January 11, 1948, when he was sent to the White residence by an ex-convict, one Joseph McKinney, with whom White had shared a cell at the penitentiary at Reno, Nevada [Rep. Tr. pp. 15-16].[2] Appellant asked if McKinney had given White any information about how to make counterfeit bills, and when White replied that McKinney had said very little about it, appellant stated that he had been experimenting with the process for sometime, and that he wanted White to help him in these experiments. Appellant then took White to his home, and showed White the fruits of his experiments in making counterfeit notes by photographing reproductions [Rep. Tr. pp. 15-17]. Appellant stated to White that McKinney used stripping film to regulate the size of the photographic reproductions. He then went with White to the Eastman

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[2]References preceded by "Rep. Tr." are to the Reporter's Transcript.

Kodak Company to purchase the stripping film [Rep. Tr. p. 19, line 19, to p. 20, line 9]. The experiments in reproducing counterfeit notes were carried on in appellant's residence [Rep. Tr. p. 21, lines 7-9]. Technical information was obtained by White and appellant from various sources and persons, including one Dr. Diehl and one Harry Funk, neither of whom suspected that appellant and White were involved in criminal activities [Rep. Tr. p. 21, line 25, to p. 22, line 1].

In July, 1948, in order to have electricity available, White and appellant moved to a laboratory on Rinaldi Street where the negative of the $100.00 bills [Gov't Exs. 1, 2, 3, 13 and 14] was made either by appellant alone, or by appellant and White together [Rep. Tr. p. 35, line 15, to p. 36, line 19]. A negative was taken to appellant's residence where the print was made [Rep. Tr. p. 36, line 20], and on January 11, 1949, appellant made the counterfeit note [Gov't Ex. 14] and gave it to White to pass at Brown's Market. White was present when the counterfeit notes [Gov't Exs. 1, 2, 3] were made [Rep. Tr. p. 41, lines 25-26].

Appellant was arrested between 9 and 10 A. M. on March 3, 1949, by Secret Service Agent Carl L. Eliason whom appellant knew to be an agent in the U. S. Secret Service acting in his official capacity [Rep. Tr. p. 180, line 16, to p. 181, line 9], and was told by Agent Eliason that he need not make a statement but if he made such a statement it could be used against him [Rep. Tr. p. 97, lines 9-15]. He was immediately taken to the office of the Secret Service in the Federal Building, Los Angeles [Rep. Tr. p. 90, line 9, to p. 91, line 18]. Upon arrival at the Secret Service office, appellant was questioned by Secret Service Agent Eliason, and Agents Harold C. Polenz and

Fred C. Wasson were present part of the time. Appellant related his participation in the counterfeiting activities [Rep. Tr. p. 91, line 24, to p. 93, line 7].

During the course of the interrogation, appellant stated that he had two or three negatives of $100 bills concealed in a drawer at the laboratory on Rinaldi Street; that the new owner of the laboratory was taking possession of same that day, and that he (appellant) was willing to take the Agents to the place of concealment of the negatives [Rep. Tr. p. 93, lines 7-24].

Appellant was taken to the office of the United States Attorney for the purpose of ascertaining the advisability of procuring a Search Warrant for the laboratory. Assistant United States Attorney Ray H. Kinnison again advised appellant that any statement he made might be used against him [Rep. Tr. p. 226, lines 7-11]. He at that time related to Mr. Kinnison facts concerning his participation in the counterfeiting activities and the making of Government Exhibits 1, 2, 3 and 14. Appellant then took Secret Service Agents Eliason and Polenz to the laboratory on Rinaldi Street [Rep. Tr. p. 94, lines 16-19], and at the conclusion of the search for the negatives, appellant was returned to the office of the Secret Service where he made a written statement as to his counterfeiting activities [Gov't Ex. 15].

Appellant was placed in the County Jail on the evening of March 3, 1949, and on the following morning he was arraigned before Commissioner Howard W. Calverley [Rep. Tr. p. 105, line 22, to p. 106, line 1].

V.

ARGUMENT.

The Evidence Was Sufficient to Support the Verdict.

On appeal from conviction on the ground of errors relating to the sufficiency of the evidence to support the verdict, the duty of the Court of Appeals is limited to the determination of whether there was any substantial evidence to sustain the verdict.

U. S. v. Francis, 172 F. 2d 1.

(1) The Admissibility and Effect of the Testimony of an Accomplice.

Appellant contends that the evidence was insufficient to support the verdict, and that it was contrary to law and the evidence on the ground that the prosecution of the case was based primarily on the testimony of Robert White, the accomplice of the appellant (App. Br. pp. 4-5), and that the evidence in this case was that the defendant (appellant) was an "aider and abettor" in making of counterfeit bills (App. Br. p. 4).

It is well settled that in the Federal Courts a defendant can be convicted on the uncorroborated testimony of an accomplice. See, *e. g.:*

Todorow v. U. S., (9 Cir. 1949) 173 F. 2d 439;

Caminetti v. U. S., (1917) 242 U. S. 470, 495;

Westenrider v. U. S., (9 Cir. 1943) 134 F. 2d 772, 774;

U. S. v. Wilson, 154 F. 2d 802, 805.

Under this well-settled rule of law, it is respectfully submitted that the testimony of Robert White [Rep. Tr.

pp. 13-42] is substantial evidence sufficient to sustain the verdict, without resorting to the additional and corroborating testimony present in this case.

Appellant cites the cases of *Sykes v. U. S.,* 204 Fed. 909, and *Dahly v. U. S.,* 50 F. 2d 37, in support of his contrary view. It is noted that the case of *Sykes v. U. S.,* decided in 1913, represents a small minority view in a different Circuit. The case of *Dahly v. U. S., supra,* does not state the broad rule that the uncorroborated testimony of an accomplice is not substantial evidence sufficient to support a verdict but merely states that on the "exceptional facts in that case" (App. Br. p. 7, lines 3-4) the testimony of the accomplice was not substantial evidence sufficient to support a verdict. In addition to that portion of the opinion set out at length by appellant (App. Br. p. 7), the Court, in the next paragraph, at page 45, states—"But even giving full credence to his (accomplice Smith's) testimony, yet the suspicious circumstances thus raised fall far short of being substantial evidence of the conspiracy charged and of Dahly's connection therewith."

In this case, the testimony of the accomplice White does not merely raise suspicious circumstances but shows the guilt of the appellant.

The Trial Judge, in rendering his verdict, took into consideration that the testimony of an accomplice should be looked on with caution, but nevertheless a conviction can be based upon it without corroboration. In rendering his verdict, the Trial Judge stated:

> "There is sufficient evidence even if you eliminate White's testimony, and I don't see any reason why we should eliminate him here. The mere fact that he has been convicted of a felony does not warrant repudiating his testimony.

"You are a very adroit cross-examiner. You did not budge him in one respect by any question that you asked. This not your fault. You conducted a very adroit examination, but his story had all the earmarks of truth, and that is why it couldn't be budged." [Rep. Tr. p. 242, lines 7-16.]

"Furthermore, you can convict in the Federal Court on an accomplice's testimony, assuming he was an accomplice, without corroboration. The corroboration rule does not apply in the Federal Court.

"As a matter of fact, I have devised an instruction which I give jurors, that while they should look to the testimony of an accomplice with caution, nevertheless, I say, if it carries conviction you can base your conviction upon that without any corroboration at all." [Rep. Tr. p. 243, lines 7-15.]

"I am satisfied from the facts in the case, beyond a reasonable doubt, that the defendant is guilty of the offense charged.

"I shall not take the time to indicate in detail the grounds. They are not necessary, although at times we do. I have already indicated in my discussion with counsel why I believe that the story that both Mr. and Mrs. Haines told is preposterous and not worthy of belief; that their own contradictions and evasions condemn the story.

"I am also convinced that White's story is credible. It is corroborated by the facts in this case, some of which I have already indicated."

(2) The Testimony of Robert White, Appellant's Accomplice, Is Corroborated in This Case.

Government's Exhibits 4 through 10 were found in the possession of the appellant at the time of his arrest [Rep. Tr. p. 11, line 13, to p. 12, line 5], more than three months after the appellant had last seen his accomplice, Robert White [Rep. Tr. p. 170, lines 5-22].

Government's Exhibit 10 referred to Kodalith film, which is a high contrast film, and is the film used in making a negative from which to make counterfeit notes when using a photographic process such as was used in making the counterfeit note [Gov't Ex. 13; Rep. Tr. p. 221, line 17, to p. 222, line 1].

Government's Exhibit 9 is a formula for sensitizing the solution to be applied to either film or paper.

Government's Exhibit 7 is a common green toner which could be used to produce the green color of the counterfeit note [Gov't Ex. 3; Rep. Tr. p. 222, lines 2-15].

The testimony of Robert White to the effect that the photographic promotion by appellant was a mere blind to gain technical knowledge in that Dr. Diehl never offered information to appellant but that it was asked for [Rep. Tr. p. 211, lines 12-22; p. 246, lines 15-19] is corroborated and bears out the facts.

Further corroboration is found in the confession made by the appellant to Assistant United States Attorney Ray H. Kinnison [Rep. Tr. p. 226, line 12, to p. 227, line 19] and the signed confession [Gov't Ex. 15] made in the presence of Secret Service Agent Carl L. Eliason.

Admissions and Confessions Were Properly Admitted in Evidence by the Trial Court.

The assignment of error due to the admission of appellant's confessions is not properly before this Court for decision.

1. *The Confessions Were Admitted Without Objection.*

The Appellate Court will not consider matters which are alleged as error for the first time on appeal, and such rule applies in criminal cases as well as civil cases unless in criminal cases the alleged error would result in manifest miscarriage of justice, or would seriously affect fairness, integrity, and public reputation of judicial proceedings.

Robertson v. U. S., 171 F. 2d 335;
Smith v. U. S., (9 Cir. 1949) 173 F. 2d 181;
Alberty v. U. S., (9 Cir. 1937) 91 F. 2d 461.

The introduction of the confessions in this case does not come within this exception. It is noted that the Trial Court reserved ruling on the admissibility of the confession until appellant's counsel had the opportunity to attack their admissibility on cross-examination when they were received in evidence without objection [Rep. Tr. pp. 97-106].

2. *Voluntary Confessions Obtained Without Duress, Threats or Undue Psychological Pressure, Unless Obtained During an Illegal Detention for the Purpose of Obtaining a Confession, Are Admissible in Federal Courts.*

Simon v. U. S., (9 Cir. 1949) 178 F. 2d 615, 619 (rehearing denied Jan. 16, 1950);

McNabb v. U. S., 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819;

Mitchell v. U. S., 322 U. S. 65;

Upshaw v. U. S., 335 U. S. 140, 69 S. Ct. 107.

The basic test of the admissibility of a confession is whether or not the confession was made voluntarily. This test was early recognized and was followed in all the cases cited by appellant (App. Br. p. 9, lines 18-26). The time elapsing between the arrest of the defendant and his arraignment before the United States Commissioner is merely a factor that is to be taken into consideration by the Trial Court in determining whether or not the confession was voluntarily obtained. The Supreme Court in *McNabb v. U. S., supra,* did not state that a confession obtained prior to the arraignment of the accused required the rejection of the confession, but that under the facts and circumstances presented in that case, the confessions were not voluntarily made, and thus were inadmissible. Justice Frankfurter, at page 346, states:

> "The mere fact that a confession was made while in the custody of the police does not render it inadmissible." (Cases cited.)

3. *Scope of Review Where the Admission of a Confession Is Assigned as Error.*

The finding of the Trial Judge upon a preliminary question of fact, as a basis for admitting evidence such as a finding that the confession is voluntarily made by the defendant, is not reviewable on appeal.

This Circuit in *Lewis v. U. S.*, 74 F. 2d 173, at page 175, stated:

> "The question to be determined by this Court with reference to the admissibility of the confession is whether or not the Court abused its discretion in admitting the evidence."

Citing:

> *Mangrum v. U. S.*, (9 Cir.) 289 Fed. 213, 215;
> *Hale v. U. S.*, (8 Cir.) 25 Fed. 430, at 437.

In *Mangrum v. U. S., supra,* the Ninth Circuit, in an opinion by District Judge Bean, the Court stated the rule to be:

> "But, where on the trial of a criminal case a confession of the defendant is offered in evidence, it becomes necessary for the Trial Court to ascertain and determine, as a preliminary question of fact, whether it was freely and voluntarily made, and whether a previous undue influence, if any, had ceased to operate upon the mind of the defendant, and in such determination the court is vested with a very large discretion, which will not be disturbed on appeal, unless an abuse thereof is shown." (Cases cited.)

There is nothing in the present case to show that the Court abused its discretion in admitting the confessions in question; in fact, the record shows to the contrary.

The Court was fully informed concerning appellant's signing of the Waiver of Trial by Jury. Counsel for appellant was satisfied of the voluntary character of the confessions, and apparently gave consent to their introduction in evidence when she raised no objection to their introduction in evidence.

4. *The Confessions Were Properly Admitted as Voluntary Confessions.*

The facts heretofore set forth, regarding the obtaining of the confessions (Appellee's Op. Br. p. 4) show the voluntary character of the confessions, and are corroborated by the testimony of the appellant himself. In regard to the confession taken by Secret Service Agent Carl L. Eliason [Gov't Ex. 15], appellant, on direct examination, testified:

> "Q. Just tell us the conversation. Have you told us all that happened? A. No. I was there all day in the Federal Building, and after he talked to me awhile—we visited, he was very polite." [Rep. Tr. p. 157, lines 15-19.]
>
> "Q. By Mrs. Root: Mr. Haines, did you tell Mr. Eliason 'I would like to state fully all I know about this case'? Did you tell him that? A. I did that and I don't know much about it to state to him. I told him what I did know." [Rep. Tr. p. 160, lines 3-8.]

When questioned by the Court, appellant testified as to whether the confession was voluntarily made, as follows:

> "Q. The Court: So during the day you knew that while Eliason claimed to be your friend, that he said that you were being accused by White of participating in the counterfeiting of bills?
>
> A. The Witness: He gave it to me as a remark. He said 'How much truth is there in it?' And I said, 'It is preposterous.' And he said, 'Let's go talk about it.' It was a situation there, like a couple of friends talking over the situation. I didn't regard it as an arrest. I regarded it as a friend of mine coming along. And he said, 'Get in, let's take a ride.'
>
> Q. The Court: All right.

Q. By Mr. Hildreth: When Mr. Eliason first met you did he identify himself as an agent of the Secret Service? A. He didn't have to do that. I knew that he was. I knew him in his capacity.

Q. Did he tell you that he was on official business? A. No, he didn't say that at first. He did a few minutes afterwards. At first he said, 'Hi.'" [Rep. Tr. p. 180, line 16, to p. 181, line 9.]

As to the confession made by appellant, orally, to Assistant United States Attorney R. H. Kinnison, appellant testified on cross-examination:

"Q. By Mr. Hildreth: Did you have a conversation with an Assistant U. S. Attorney the morning you were arrested? A. Who would that be? You?

Q. No. Mr. Kinnison. A. That is his capacity? I see. I thought I did, yes.

Q. And did you regard Mr. Kinnison as a friend? A. Well, they were all friendly. They were all very polite to me. They were all very nice people." [Rep. Tr. p. 175, lines 1-12.]

5. *The Confessions Were Not Obtained at a Time When Appellant Was Being Illegally Detained, or Detained for the Purpose of Obtaining a Confession.*

A voluntary confession obtained during a legal detention is admissible.

Symons v. U. S., (9 Cir.) 178 F. 2d 615;
U. S. v. Upshaw, 335 U. S. 410, 69 S. Ct. 170.

Rule 5(a) of the Federal Rules of Criminal Procedure requires any person making an arrest without a warrant to take the arrested person, without unnecessary delay, before the nearest available United States Commission. Unnecessary delay is construed by this Court in *Symons v. U. S., supra,* to require only that the arrested person

be taken before a Commissioner during his regular office hours. In this case, appellant voluntarily agreed to take Secret Service Agents to find two or three negatives of $100 bills concealed in a drawer in a laboratory on Rinaldi Street. Immediate action was necessary as the new owner of that laboratory was that day taking possession of the premises [Rep. Tr. p. 93, lines 7-24].

The Commissioner's office was closed when appellant and the agents returned from the laboratory [Rep. Tr. p. 96, lines 9-12], and the appellant was arraigned the next morning before Commissioner Howard W. Calverley [Rep. Tr. p. 105, line 22, to p. 106, line 1].

This Circuit in the case of *Janus v. U. S.,* (9 Cir.) 38 F. 2d 431 at page 437, found that a detention during the night until the Magistrate had opened his office the following morning was reasonable. Moreover, the voluntary confession made prior to the time that the detention has become illegal for the purpose of procuring a confession is admissible.

In the case of *U. S. v. Mitchell,* 322 U. S. 65, 64 S. Ct. 896, 88 L. Ed. 1140, although the defendant was illegally held eight days, the Court accepted the record as showing that Mitchell promptly and spontaneously admitted his guilt within a few minutes after his arrival at the police station. Mitchell's confessions, therefore, were found to have been made before any illegal detention had occurred. The Court then stated in the *Mitchell* opinion:

> "The illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures."

Thus, the holding in the *Mitchell* case was only that Mitchell's subsequent illegal detention did not render inadmissible his prior confessions.

The Appellant Intelligently Executed a Waiver of Trial by Jury, and That Waiver Is Binding Upon Appellant.

(1) Appellant's Third Assignment of Error That the Court Erred in Not Granting a Motion for New Trial Is Not Properly Before This Court.

The granting of or refusing a new trial rests in the discretion of the Trial Judge, and it being manifest the Trial Court did not act arbitrarily or capriciously nor upon any erroneous concept of the law, the Appellate Court may not substitute its judgment for that of the Trial Judge.

Gage v. U. S. (9 Cir., 1948), 167 F. 2d 122, at page 125;

U. S. v. Johnson, 327 U. S. 106, 66 S. Ct. 464, 90 L. Ed. 562;

Eagleson v. U. S., 172 F. 2d 194; cert. den. 336 U. S. 952, 69 S. Ct. 882, 93 L. Ed. 834.

It cannot be said that the Trial Court in this case acted arbitrarily, capriciously, nor upon any erroneous concept of the law for, in fact, the record discloses that no Motion for New Trial was addressed to the Trial Court.

(2) The Right of the Defendant to Waive a Trial by Jury.

Trial by jury in criminal cases is not jurisdictional but is a privilege which the accused may forego at his election.

Patton v. U. S., 281 U. S. 276, 50 S. Ct. 253, 84 L. Ed. 854.

There is no difference in substance between a complete waiver of a jury and consent to be tried by a number less than twelve. A Federal District Court has authority in

the exercise of sound discretion to accept a waiver of jury trial in a criminal case and to proceed to the trial and determination of the case with a reduced number or without a jury, the grant of jurisdiction by Title 18 U. S. C., Section 3231, being sufficient to that end. The Court further holds:

> "* * * before any waiver can be effected the consent of the government counsel and the sanction of the Court must be had in addition to the express and intelligent consent of the defendant and the duty of the trial court in that regard is not to be discharged as a mere matter of rote but with sound and advised discretion with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof and with a caution increasing in degree as the offenses dealt with increase in gravity."

NOTE: In the *Patton* case, after the commencement of a trial in the Federal Court before a jury of twelve men upon an indictment charging a crime punishment for which may involve a penitentiary sentence if one juror becomes incapacitated and unable to proceed further with his work as a juror, the defendant and the government through its official representative in charge of the case may consent to the trial's proceeding to a finality with eleven jurors and the defendant thus may waive the right to a trial and verdict by a constitutional jury of twelve men.

In *Adams v. U. S.*, 126 F. 2d 774, the Third Circuit Court held that the accused who is not a lawyer and defending his own case without assistance of counsel could not waive trial by jury without the help or advice of

counsel. In setting aside the decision of the Circuit Court, the Supreme Court said:

> "The short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently and intelligently waive his Constitutional right to assistance of counsel. There is nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer."
>
> *Adams v. U. S. ex rel. McCann,* 317 U. S. 269, at page 275.

Where defendant without counsel acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel.

Johnson v. Zerbst, 304 U. S. 468.

(3) The Form and Sufficiency of the Defendant's Waiver of a Trial by Jury.

Whether there is an intelligent, competent, self-protective waiver of jury trial by accused, depends upon the circumstances of each case.

Adams v. U. S., supra, 317 U. S. 269, 126 F. 2d 774.

1. In the instant case the defendant was represented by counsel throughout all of the proceedings had in the District Courts and in particular by Gladys Towle Root

on the occasion when the Waiver of Trial by Jury was filed on September 7, 1949.

Where it appears by the record that a party was represented by counsel and went to trial before the Court without objection or exception, waiver of his right to jury trial will be presumed and he will be held in the Supreme Court to the legal consequences of such a waiver.

U. S. v. Harris, (1882) 106 U. S. 629, 1 S. Ct. 601, 27 L. Ed. 290;

McMullen v. Squire, 144 F. 2d 703;

Tompsett v. State of Ohio, 146 F. 2d 95; cert. den. 65 S. Ct. 916, 324 U. S. 869, 89 L. Ed. 1424.

The Court said at page 635:

"And though the right of trial by jury is a constitutional one, yet, this Court has declared that when it simply appeared by the record that a party was present by counsel and had gone to trial before the court without objection or exception a waiver of his right to a jury trial would be presumed and he would be held in this court to the legal consequences of such waiver. Citing *Kearney v. Case,* 12 Wall. 275."

The sufficiency of the evidence establishing intelligent and understanding waiver of trial by jury.

McMullen v. Squire, 144 F. 2d 703.

"At the hearing accorded him in open court on the Writ of Habeas Corpus, appellant testified that he was induced by trade and promises and coerced by the United States Attorney to give up his right to trial by jury. The basis of this claim is his testimony that he traded his right of jury trial for the permission to take the deposition of one Coffelt. The

able judge who heard his testimony properly did not regard this claim. The record clearly shows that 10 days prior to the signing of the document relating to Coffelt's deposition, McMullen in open court and with advice of counsel had already waived the right to trial by jury. This declaration of coercion is obviously an afterthought based upon the peculiar language of the stipulation above quoted, relating to the deposition of Coffelt. This is a typical claim, without substance, met with habituality in habeas corpus cases dealing with hardened offenders with criminal records who balk not at perjury as to absent officials in order to convince a judge, who is alert to protect against the invasion of constitutional rights, that forfeited liberty should be restored. The Court committed no error in not giving credence to this claim."

Tompsett v. State of Ohio, 146 F. 2d 95; cert. den. 65 S. Ct. 916, 324 U. S. 869, 89 L. Ed. 1424.

In addition to the testimony set forth in Appellant's Opening Brief (App. Br. p. 11, line 6, to p. 15, line 9), the record shows that appellant's counsel, Mrs. Gladys Towle Root, related to the Court the circumstances appellant's signing of Waiver of Trial by Jury. The remarks of Mrs. Root are as follows:

"Mrs. Root: If your Honor please, I called Mr. Haines in approximately a week before the case was to be heard for trial. There was some discussion relative to whether or not the case could be continued again, and I suggested to him in that regard that it could not, in my opinion. We then discussed whether or not we were to have a jury, and I stated to him that in my opinion in this case, from what he had told me, that I would advise and recommend a waiver

of a jury, that I had the utmost of confidence in your Honor and I felt that you, sitting as a trial judge in this matter, were far superior to that of a jury, as predicated upon the facts of the case that he had given me. I therefore recommended that he waive a jury and that your Honor hear it sitting as a court and a jury. He said he would think about it and he would come back, and he did come back I think it was two days before and then a day before, and I told him I wanted to notify the clerk that we would not need a jury, in order to save the expense of the government if the jury was to be here for that one matter alone, and I wanted to get his opinion in advance, and he said that he would leave it entirely to my discretion, if I thought that was the better trial, certainly that was all right with him. And again in the morning I told him that it would be necessary for him to sign a waiver, and he signed it here in the court room." [Rep. Tr. of Proc. Oct. 24, 1949, p. 14, line 16, to p. 15, line 15.]

At the time of sentence, the Trial Judge conducted a hearing with reference to appellant's signing of the Waiver of Trial by Jury [Rep. Tr. of Proc. Oct. 24, 1949, p. 11, line 16, to p. 20, line 17]. At the conclusion of this hearing, the Trial Court found:

"The Court: I will state for the record that my own recollection of the facts, aside from what may have taken place outside my presence, is that this defendant, as the record will show, was asked orally by the clerk whether he wanted to waive a jury, first, and a statement was made either by the defendant or his counsel that he was going to waive a jury, on Tuesday morning, and that he was handed this blank, which was absolutely blank, didn't have any signature,

that he signed it first, his attorney signed it next, Mr. Hildreth signed it third, whereupon it was handed to the clerk who handed it to me, whereupon I stated that the jury having been waived that I would try a jury case that day, and that this case was continued to the following day, on which day we began the trial which continued for two days. And in my opinion this defendant is not telling the truth when he states that he didn't know what was going on." [Rep. Tr. of Proc. Oct. 24, 1949, p. 18, line 21, to p. 19, line 11.]

VI.

Conclusion.

It is obvious from a consideration of the entire record that appellant was accorded a fair trial, and that there was substantial evidence to support the verdict. There were no errors in law in the rulings of the Trial Court, and the admission of the confessions was not improper. Although Motion for New Trial was not made by appellant, the Trial Court would not have erred in refusing to grant appellant a new trial.

Conviction should be affirmed.

Respectfully submitted,

ERNEST A. TOLIN,
United States Attorney,
NORMAN W. NEUKOM,
Assistant U. S. Attorney,
Chief of Criminal Division,
JACK E. HILDRETH,
Assistant U. S. Attorney,
Attorneys for Appellee.